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# Securing Felons' Voting Rights in America

Anthony Gray\*

## INTRODUCTION

*"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."*<sup>1</sup>

*"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."*<sup>2</sup>

This Article examines the extent to which the franchise of current and former felons has been contentious in a range of jurisdictions. Courts in Europe, Canada, and Australia have recently moved to protect the voting rights of prisoners.<sup>3</sup> So far, the United States has been an anomalous jurisdiction with respect to voting rights of prisoners. Almost all states prohibit from voting a person in jail for a felony offense, a majority prohibits a person from voting whilst on probation, and some maintain the prohibition on the convicted person's voting even after the person has been released from prison and is not under probation.<sup>4</sup> Data from the Sentencing Project suggests that combined these

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1. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

2. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

3. See, e.g., Hirst v. United Kingdom (No. 2), 681 Eur. Ct. H.R. (2005) [NOTE: THIS IS A NEW PROPER WAY TO CITE TO THE EUROPEAN COURT OF HUMAN RIGHTS], Sauve v. Canada [2002] 3 S.C.R. 519, and Roach v. Electoral Comm'r (2007) 233 CLR 162 (Austl.).

4. These states are Florida, Iowa, Kentucky, and Virginia. See, e.g., VA. CONST., art. II, § 1 (2002); FLA. STAT. § 97.041(2)(b) (2001); see also *Felony Disenfranchisement Laws in the United States*, THESENTENCINGPROJECT.ORG (last visited Dec. 22, 2013) (for details of each individual state's approach). Indeed, the author's interest in this topic piqued while travelling to Richmond, Virginia. The front page of the *Richmond Times-Dispatch* on January 15, 2013, referred to a committee vote that killed off mooted reforms to voting entitlements of felons in that state. See *Disenfranchised Ex-Cons a Stain on Virginia's Democracy*, WASHINGTON POST, May 28, 2013.

provisions deny the vote to almost six million individuals. About forty-five percent of these individuals have completed their sentence.<sup>5</sup>

Particularly in the United States, but in other jurisdictions as well, felons' voting rights are inextricably caught up in racial issues. It is not news that the incarceration rate of some racial minorities, including African Americans in the United States and Aboriginal and Torres Strait Islander people in the Australia, author's home country,<sup>6</sup> is higher than for the non-racial minority population. As a result, whether by design or by accident (a crucial distinction, according to the jurisprudence I later discuss), the impact of disenfranchising prisoners disproportionately affects racial minorities. Data from the Sentencing Project suggests that approximately 2.2 million African Americans are disenfranchised—7.7% of the African American population, compared with 1.8% of the non-African American population.<sup>7</sup> This takes place in a historical context of continual attempts by some states and the federal government to deny African American people the right to vote, as well as the broader context to deny economic and education opportunities. It is tempting to see the disenfranchisement of current or ex-prisoners as just another in the long line of attempts, which I document later in this Article, to disempower racial minorities. My own country, Australia, is certainly not blameless in this regard either; a referendum to change the Constitution to recognize indigenous people as people, rather than fauna, occurred as recently as 1967, and the final Australian state conferred Indigenous Australians with voting rights as recently as 1965.<sup>8</sup>

Denial of the right to vote to current or former prisoners is somewhat analogous with the British concept of “civil death,” originally describing the status of a person sentenced to life imprisonment.<sup>9</sup> As the term suggests, it encompassed the convict losing privileges typically attached to an individual, such as the right to own property, the right to choose who would inherit your property, the right to bring legal action, the right to work, and the right to vote. The American colonies never applied the “civil death” itself, but remnants of it

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5. *Felony Disenfranchisement Laws*, *supra* note 4; *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, THESENTENCINGPROJECT.ORG (last visited Dec. 22, 2013).

6. Winder notes that an Aboriginal person is thirteen times more likely to be incarcerated in Australia than a non-Aboriginal person. Megan A Winder, *Disproportionate Disenfranchisement of Aboriginal Prisoners: A Conflict of Law That Australia Should Address*, 19 PAC. RIM. L. & POLY. J. 387, 410 (2010). Aboriginal and Torres Strait Islander people were the original inhabitants of the land now identified as Australia. *Id.* They have suffered from entrenched racism, as well as many of the social disadvantages familiar to those of African American heritage. *Id.*

7. *Felony Disenfranchisement Laws*, *supra* note 4.

8. Megan Winder notes that the Commonwealth Franchise Act of 1902 explicitly excluded indigenous Australians from being able to vote, unless their state allowed it. WINDER, *supra* note 6, at 393; Graeme Orr, *The Voting Rights Ratchet: Rowe v. Electoral Commissioner*, 22 PUB. L. REV. 83, 87 (2011).

9. See Special Project, *Collateral Consequences of Criminal Conviction*, 23 VAND. L. REV. 929, 942–43 (1970); Alec Ewald, *Civil Death: The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045 (2002).

are evident in the long tradition of denial of the right to vote to those convicted of particular crimes.

Of course, voting is seen as one of the most fundamental rights of all in a democracy, and the United States is the leading democracy in the world, the leader of the free world. In 2008 and 2012, the United States elected an African American president. Many argued that the election of Barack Obama heralded a “post-racial” period in United States history, a relatively quick turnaround from the days of segregation, white supremacy, and slavery. However, to a non-American, the continued acceptance of laws that operate to deny the vote to prisoners and ex-prisoners, with their clearly disproportionate impact on racial minorities, serves as a reminder of those unedifying parts of American history reflecting racial discrimination and intolerance. Of course, I believe and hope that, in time, these voting laws are seen as the anomaly, not the election of an African American president or the full participation of all people in the political process, regardless of race.

This Article considers the current legal position regarding voting rights of prisoners and ex-prisoners in a range of jurisdictions, before considering the need for a reform. This reform will be centered on the position in the United States. While in the past I have suggested how Australian law could be enriched by the American jurisprudence on a range of human rights issues,<sup>10</sup> on the question of the right to work, the United States jurisprudence would benefit from consideration of other jurisdictions’ jurisprudence.

In Part I of this Article, I outline the current United States position with respect to the voting rights of prisoners. In Part II, I consider relevant international developments to see whether United States law could benefit from consideration of international developments. One of the themes of the international literature is that voting rights are recognized as expression, although much of the case law concerns interpretation of provisions that directly confer the right to vote. Picking up on this theme of voting rights as expression, Part III considers whether the First Amendment could be utilized in aid of voting rights.

The paper makes two arguments advocating for stronger American constitutional protection of voting rights of prisoners: (1) the current American position is contrary to much of the comparable democracies’ case law, which reasoning is compelling, such as seeing voting as expressive activity; and (2) development of the protection of voting rights law in the United States can be based on the First Amendment, separation of powers, or other democratic principles enshrined in the U.S. Constitution.

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10. See, e.g., Anthony Gray, *Forfeiture and the Civil/Criminal Divide*, 15(1) NEW CRIM. L. REV. 32 (2012); Anthony Gray, *The Right to Silence: Using American and European Law to Protect a Fundamental Right*, 16(3) NEW CRIM. L. REV. (forthcoming 2013); Anthony Gray, *Racial Vilification and Freedom of Speech in Australian and Elsewhere*, 41(2) COMMON L. WORLD REV. 167 (2012); Anthony Gray, *Applying Provisions of the Constitution to Protect Human Rights from Intrusion by State Parliaments*, 18(4) AUSTRALIAN J. ADMIN. L. 229 (2012).

# I. UNITED STATES AND VOTING RIGHTS<sup>11</sup>

“I take a dim view of this pathological search for discrimination. It is about time the Court faced the fact that the white people of the South do not like the colored people.”<sup>12</sup>

The era of reconstruction in the late 1860s must have seemed very promising for race relations, with the passage of the three amendments abolishing slavery, apparently enshrining equal protection,<sup>13</sup> and proscribing the denial of voting rights due to things such as race.<sup>14</sup> In reality, the Southern states resorted to indirect means<sup>15</sup>—by granting extensive discretion to government officials in voters’ registration,<sup>16</sup> limiting the right to vote in primary elections to whites on the basis that political parties as private organizations were not subject to constitutional restriction,<sup>17</sup> introducing poll taxes,<sup>18</sup> instituting literacy tests,<sup>19</sup> denying voting privileges for those convicted of crimes of “moral turpitude,”<sup>20</sup>

11. There is a vast literature on the question of disenfranchisement of prisoners. See, e.g., Alice Harvey, *Ex-Felon Disenfranchisement and its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145 (1994); Virginia Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727 (1998); Angela Behrens, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 MINN. L. REV. 231 (2005); Andrew Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L. J. 537 (1994); *The Disenfranchisement of Ex-Felons: Citizenship, Criminality and the Purity of the Ballot Box*, 102 HARV. L. REV. 1300 (1989); *The Equal Protection Clause as a Limitation on the States Power to Disfranchise Those Convicted of a Crime*, 21 RUTGERS L. REV. 297 (1967); Ewald, *supra* note 9.

12. HARRY ASHMORE, *CIVIL RIGHTS AND WRONGS: A MEMOIR OF RACE AND POLITICS 1944-1994* 342 (1994) (quoting William Rehnquist, former Chief Justice of the United States Supreme Court).

13. However, Section 2 acted as an apparent limitation on the equal protection contemplated by the Fourteenth Amendment, an issue that would become critical more than a century later in the *Ramirez* decision of 1974; it was politically inadvisable to go to the country in 1866 on a platform having anything to do with negro suffrage. Alexander Bickel, *The Original Understanding and the Segregation Decision* 69 HARV. L. REV. 1, 44 (1955).

14. U.S. CONST. amend. XII–XV.

15. Some were quite open, with the delegate to the Virginia State Constitutional Convention claiming that the convention was elected with a view to the elimination of every negro voter. 2 Report of the Proceedings and Debates of the Constitutional Convention 3076 (Va. 1906). Everybody knows that this Convention has done its best to disfranchise the negro. 2 Official Proceedings of the Constitutional Convention of the State of Alabama 4782 (1901); PAUL LEWINSON, *RACE, CLASS AND PARTY* (1932); Shapiro, *supra* note 11.

16. *Williams v. Mississippi*, 170 U.S. 213 (1898), although the court did strike down a law that, while race-neutral on its face, was shown to be applied in a racially discriminatory manner, as being offensive to the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

17. *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947).

18. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (the twenty-fourth amendment abolished this possibility).

19. *Lassiter v. Northampton Cnty. Bd. of Election*, 360 U.S. 45 (1959); *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966).

20. The Supreme Court of Mississippi famously claimed that African Americans were more likely than whites to be convicted of certain crimes: “by reason of its previous condition of servitude and dependence, [the African American] race had acquitted or attenuated certain particularities of habit, of temperament and of character, which clearly distinguished it, as a race, from

and drawing unusual electoral boundaries to minimize the influence of African American voters.<sup>21</sup> Furthermore, extensive empirical evidence links disenfranchisement laws with race,<sup>22</sup> as well as disproportionate outcomes for African Americans in criminal justice system.<sup>23</sup>

What is interesting is that denial of the right to vote to prisoners and ex-prisoners, which as earlier indicated impacts disproportionately on African Americans just as the above laws did, survives. Perhaps it survives because it might be justified for reasons other than out and out racism.<sup>24</sup> Such laws did pre-exist the right of African American voters to vote. However, given developments in the past half-century, the restrictions appear anomalous.<sup>25</sup> In all of the contexts above, the courts have seen through legislative attempts to achieve

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that of the whites—a patient, docile people, but careless, landless, and migratory within narrow limits . . . and its criminal members given rather to furtive offences than to the robust crimes of the whites.” *Ratliff v. Beale*, 74 Miss. 247, 266–67 (1896) (connecting African Americans with crimes such as bribery, burglary, theft, arson, fraud, perjury, forgery, embezzlement, and bigamy, apparently justifying disenfranchisement in relation to those categories of crime); *Williams*, 170 U.S. 213; *Hunter v. Underwood*, 471 U.S. 222 (1985).

21. *Shaw v. Hunt*, 517 U.S. 899 (1996).

22. Behrens, Uggan, and Mazza found (a) each one percent increase in the percentage of prisoners who were non-white increased the odds by approximately ten percent that the state would enact felon disenfranchisement laws; (b) a ten percent increase in a states non-white prison population raises the odds of passing an ex-felon disenfranchisement law by about fifty percent; and (c) the percentage of African American prison inmates was a negative indicator of repeal of felon disenfranchisement laws. Angela Behrens, Christopher Uggan & Jeff Manza, *Ballot Manipulation and the “Menace of Negro Domination”: Racial Threat and Felon Disenfranchisement in the United States 1850-2002*, 109(3) AM. J. SOC. 559, 586, 588, 594 (2003).

23. *Furman v. Georgia*, 408 U.S. 238 (1972); *McCleskey v. Kemp*, 481 U.S. 279 (1989). Schneider and Smykla found that African American defendants were much more likely to be executed than a white defendant committing the same crime. VICTORIA SCHNEIDER & JOHN SMYKLA, A SUMMARY ANALYSIS OF EXECUTIONS IN THE UNITED STATES 1608-1987: THE ESPY FILE; ROBERT M. BOHM, THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH 1, 11; Kim Forde-Mazrui, *Learning Law Through the Lens of Race* 21 J. L. & POL. 1 (2005). It is reported that in seven states, between eighty and ninety percent of drug offenders sent to prison are African American, and that in fifteen states, African Americans are jailed on drug charges at a rate 20–25 times higher than whites (and not accounted for by different drug usage rates among races). HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS 12(2) (2000). Among young offenders who had never been to prison before, African-American offenders are six times more likely to be incarcerated than whites for identical crimes. EILEEN POE-YAGAMATA & MICHAEL JONES, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF MINORITY YOUTH IN THE JUSTICE SYSTEM [PINCITE NEEDED] (2000).

24. Non-racial explanations and excuses for the systematic mass incarceration of people of color are plentiful. It is the genius of the new system of control that it can always be defended on non-racial grounds, given the rarity of a noose or a racial slur in connection with any particular criminal case. MICHELLE ALEXANDER, THE NEW JIM CROW 100 (2010).

25. Shapiro, *supra* note 11, at 538. Criminal disenfranchisement—the denial of the vote to citizens convicted of crimes—was the most subtle method of excluding blacks from the franchise, felon disenfranchisement laws have been more effective in eliminating black voters in the age of mass incarceration than they were during Jim Crow. *Id.*; ALEXANDER, *supra* note 24, at 187–88. Jeff Manza and Christopher Uggan found that there was a positive correlation between the size of a state’s African-American population and the existence of felon disenfranchisement laws. JEFF MANZA & CHRISTOPHER UGGAN, LOCKED OUT 67 (2006).

indirectly what they could not accomplish directly. Courts have recognized that rights are weak when they can be attacked by indirect means, and have largely been alert to such possibilities:

[t]he United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race . . . constitutional rights would be of little value if they could be . . . indirectly denied.<sup>26</sup>

However, the Supreme Court surprisingly has not been as robust in the defense of such a fundamental democratic right,<sup>27</sup> despite its acceptance of the right to vote as pivotal and “preservative of all other rights.”<sup>28</sup> Taking the Court at its word, we might have seen a more robust response to felon disenfranchisement than what the following record reflects.

First, *Richardson v. Ramirez* squarely rejected a challenge to the denial of voting rights to ex-prisoners on the Fourteenth Amendment grounds.<sup>29</sup> While conferring equal protection rights on all United States citizens in Section 1, in Section 2, it provides that:

when the right to vote at any election for the choice of electors for President and Vice-President of the United States Representatives in Congress, the Executive and Judicial officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, *or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.<sup>30</sup>

The majority noted that at the time of the passage of this amendment, a majority of states excluded from voting those convicted of committing serious crimes.<sup>31</sup> Congress’s 1867 Reconstruction Act, establishing the conditions under which former confederate states would be re-admitted to the Union, specifically referred to a state constitution being consistent with the United States Constitution, and framed by delegates voted in by male citizens of the state, but excluding those convicted of serious crime. The majority used this as evidence

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26. *Smith v. Allwright*, 321 U.S. 649, 664 (1944).

27. There are so many constitutional arguments against the disenfranchisement of felons that one can only wonder at the survival of the practice. George Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Use of Infamia*, 46 UCLA L. REV. 1895, 1903 (1999).

28. *Hopkins*, 118 U.S. at 370. Or, as John Ely puts it, we cannot trust the ins to decide who stays out, and it is therefore incumbent on the courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason (as there will be) it had better be a convincing one. JOHN ELY, *DEMOCRACY AND DISTRUST* 120 (1980). Ely claims that judicial review should be about unblocking stoppages in the democratic system, disenfranchisement being the quintessential stoppage. *Id.* at 117.

29. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

30. U.S. CONST. amend. XIV, §§1–2 (emphasis added).

31. *Richardson*, 418 U.S. at 48.

that Section 2 “means what it says,” and specifically contemplates that the right to vote may be removed in respect of a person convicted of a crime.<sup>32</sup> They concluded it was impossible to argue that the Fourteenth Amendment precluded the removal of a right to vote from prisoners, when Section 2 of that Amendment positively seemed to contemplate such measure.<sup>33</sup>

Justice Marshall, with whom Justice Brennan joined, wrote a strong dissent.<sup>34</sup> They took a very different view of the purpose of the Fourteenth Amendment. They argued it was a response to the Southern states refusing to enfranchise African-Americans following the end of the American Civil War, and so presented them with a choice of either enfranchising such citizens, or losing congressional representation.<sup>35</sup> This occurred in an era when it would have been politically unpalatable to explicitly grant African Americans voting rights. The literal wording in Section 2 should not be considered frozen in time, forever perpetuating a time when voting rights were denied to particular sections of society, including prisoners.

Justices Marshall and Brennan reasserted the right to vote as being the essence of a democratic society, with restrictions on it striking at the heart of representative government.<sup>36</sup> Any exclusion on the universal franchise had to be shown to be conducive to a legitimate and substantial state interest, minimally invasive, with no alternative to achieving the state's legitimate end with laws impacting less on the constitutionally protected interest.<sup>37</sup> The act of disenfranchising ex-prisoners did not pass the test—there was no basis for asserting that prisoners had less interest in the democratic process than others.<sup>38</sup> The provision was not limited to those who broke election laws. Any legitimate concern the state had with voter fraud could be dealt with in ways much less intrusive on the constitutional right to vote than disenfranchisement.<sup>39</sup> These judges rejected disenfranchisement as a hangover from the “fogs and fictions” of feudal jurisprudence, without due regard to its literal significance or the extent of infringement upon the spirit of the American system of government.<sup>40</sup> Unfortunately this was, and remains, a minority view, and the fogs and fictions persist.<sup>41</sup>

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32. *Id.* at 54–55.

33. *Id.*

34. *See id.* at 56 (Marshall, J., dissenting).

35. *Id.* at 74; *The Equal Protection Clause as a Limitation on the States*, *supra* note 11, at 302–03.

36. *Richardson*, 418 U.S. at 77.

37. *Id.* at 78.

38. *Id.* at 78.

39. *Id.* at 79–80.

40. *Id.* at 85–86.

41. The bizarre irony of the majority judgment, in which a provision ostensibly designed to improve the access of African-Americans to the franchise has been interpreted so as to restrict it, has been noted elsewhere. *Disenfranchisement as Punishment*, *supra* note 27, at 1901.



Various Courts of Appeals continue to apply the *Richardson* line to dismiss constitutional challenges to prisoner disenfranchisement laws.<sup>42</sup>

The courts have also applied the Fourteenth Amendment narrowly in requiring proof of racially discriminatory intent or purpose to show a violation.<sup>43</sup> Without discriminatory purpose, it is not enough for a provision to impact disproportionately one race.<sup>44</sup> There must be a clear pattern, not explicable on any ground other than race.<sup>45</sup> By eschewing a results or effects test and insisting on proof of improper intent, the Court has made it extremely difficult to challenge felon disenfranchisement successfully on Fourteenth Amendment grounds.

Apart from the Fourteenth Amendment, plaintiffs challenging restrictions on voting rights have also sought to engage the Fifteenth Amendment, prohibiting discrimination due to race with respect to voting, and Section 2 of the Voting Rights Act, prohibiting voting qualifications being used to deny the right to vote due to a person's race.<sup>46</sup> These rights were originally interpreted very narrowly, requiring evidence that a particular policy was motivated by racial discrimination to fall foul of either the Fifteenth Amendment or Section 2.<sup>47</sup> This mirrored the narrow interpretation that was given, and continues to be given, to the Fourteenth Amendment in this context. That interpretation had (in the case of the Voting Rights Act) and has (in the case of the Fourteenth and Fifteenth Amendments) the obvious impact of limiting the protection that the provisions would otherwise give to voting rights, given the difficulty in proving motivation.

The Act was amended to require courts to consider the effect of provisions, rather than what motivated them. However, it has remained difficult to convince courts that prisoner disenfranchisement laws violate the Voting Rights Act,<sup>48</sup> although some judges (and occasionally courts)<sup>49</sup> have dissented

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42. See, e.g., *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010); *Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005); *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009).

43. *Washington v. Davis*, 426 U.S. 229, 239–40 (1976); *Arlington Heights v. Metro House Dev. Co.* 429 U.S. 252, 265 (1977); *Hayden v. Paterson*, 594 F.3d 150 (2d Cir. 2010); *Johnson*, 405 F.3d 1214.

44. *Pers. Admr. of Mass v. Feeney*, 442 U.S. 256, 260 (1979).

45. *Arlington Heights*, 429 U.S. at 265.

46. Some argue the fifteenth amendment repealed Section 2 of the fourteenth. Gabriel Chin, *Reconstruction, Felon Disenfranchisement and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?* 92 GEO. L. J. 259 (2004).

47. *City of Mobile, Alabama v. Bolden*, 446 U.S. 55 (1980); *Hunter*, 471 U.S. 222.

48. *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986); *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004); *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc); *Johnson*, 405 F.3d at 1214; *Harvey*, 605 F.3d 1067; *Hayden v. Paterson*, 594 F.3d 150 (2d Cir. 2010); *Hayden v. Pataki* 449 F.3d 305 (2d Cir. 2006). Partly, this is because courts have insisted on a causal connection between historic racial discrimination and the disenfranchisement. *Wesley v. Collins*, 605 F. Supp. 802, 812 (M.D. Tenn. 1985); *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003). For detailed critique of these cases see Lauren Handelsman, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 FORDHAM L. REV. 1875 (2005); Behrens, *supra* note 11; Shapiro, *supra* note 11; Reuven Ziegler, *Legal Outlier Again?: U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B. U. INT'L L. J. 197 (2011); Ewald, *supra* note 9, at 1120–30; LAURENCE TRIBE, AMERICAN

from this view.<sup>50</sup> A court recently claimed that the Act was never intended to stop the states from disenfranchising prisoners.<sup>51</sup> This ongoing situation has attracted expressions of international concern.<sup>52</sup> Given the split circuit decisions on the issue of the application of the Voting Rights Act to prisoner disenfranchisement provisions, it is to be hoped that the United States Supreme Court will clarify the issue in the near future. Such a case would also allow it to reconsider the 1974 *Ramirez* interpretation of the Fourteenth Amendment, a development that many would applaud.

The reasoning of the majority in *Ramirez* is open to strong criticism, as the dissenting Justices noted in that case.<sup>53</sup> Reasoning in subsequent cases can be attacked for its narrowness or, in some cases, incoherence.<sup>54</sup> Suggestions that other parts of the Constitution apply, including the Eighth Amendment, or that the Fifteenth Amendment overrules the relevant aspect of the Fourteenth,<sup>55</sup> have also been made.<sup>56</sup> However, these arguments have not gained traction for various reasons, as has already been traduced in the literature.<sup>57</sup> Rather, I intend

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CONSTITUTIONAL LAW 1094 (1988). This is despite the Supreme Court's acceptance that the purpose of the Voting Rights Act was to rid the nation of racial discrimination in the context of voting. *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

49. *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003); *Baker*, 85 F.3d at 919.

50. *Johnson*, 405 F.3d at 1239–51 (Wilson & Barkett, JJ., dissenting); *Simmons*, 575 F.3d at 24 (Torruella, J., dissenting).

51. *Simmons*, 575 F.3d at 26; *Hayden*, 449 F.3d at 305; *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005); cf. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative*, 39(4) U. MICH. J.L. REFORM 643, 646 (2006) (the Voting Rights Act of 1965 was enacted in response to the continued, massive and unconstitutional exclusion of African-Americans from the franchise). Clearly, disenfranchisement of felons has a disproportionate impact on African-American people.

52. The United Nations Human Rights Committee has declared that the general deprivation of the right to vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not meet the requirements of articles 25 or 26 of the covenant, nor serves the rehabilitation goals of article 10(3). United Nations Human Rights Committee, *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, United States of America*, 15 September 2006; David Sloss, *Legislating Human Rights: The Case for Federal Legislation to Facilitate Domestic Judicial Application of International Human Rights Treaties*, 35 FORDHAM INT'L L.J. 445 (2012). Hench claims the Supreme Court has dismantled the Voting Rights Act. Hench, *supra* note 11, at 749.

53. See *Richardson*, 418 U.S. at 72–86 (Marshall, J., dissenting).

54. For example, in *Harvey v. Brewer*, the court dismisses an equal protection challenge to Arizona's prisoner disenfranchisement law. *Harvey*, 605 F.3d at 1067. The petitioners claim that they were being denied the fundamental right to vote was rejected on the basis that "felon disenfranchisement is explicitly permitted under the terms of Richardson . . . therefore we do not apply strict scrutiny as we would if plaintiffs were complaining about the deprivation of a fundamental right." *Id.* at 1079. So, apparently the right to vote is not fundamental in a democracy, at least if you are a prisoner.

55. See, e.g., *Disenfranchisement as Punishment*, *supra* note 27, at 1904; Chin, *supra* note 41.

56. See, e.g., *The Disenfranchisement of Ex-Felons: A Cruelly Excessive Punishment*, 7 SW. U. L. REV. 124 (1975).

57. E.g., Hench, *supra* note 11; Behrens, *supra* note 11; Fletcher, *supra* note 27.

to consider other arguments that might be used to attack the constitutionality of denying ex-prisoners, and prisoners, the franchise, arguments that have not seen much attention in the United States jurisprudence to date. First, I see how the case law in other jurisdictions might be applied in the United States context, given that other jurisdictions have more robustly defended the right to vote for those incarcerated; second, I consider whether the First Amendment might be utilized in this context.

## II. DEVELOPMENTS IN COMPARABLE JURISDICTIONS

In this part, I consider the extent to which voting rights of prisoners have been protected in comparable democracies in order to see whether the development of American law in this context could be enriched by consideration of the experience elsewhere. As I show, each jurisdiction has upheld the voting rights of prisoners in the face of government attack. In the case of Australia, this has occurred in the absence of a bill of rights. Concerns have been expressed regarding the disproportionality involved in disenfranchisement, lack of convincing justification, and impact on fundamental democratic values.

### A. Australia

It is worth noting that, unlike most other Western nations, Australia lacks a bill of rights. Perhaps as a counterweight to this, some judges in the High Court of Australia have found implied rights in the Constitution. In the controversial High Court decision in *Roach v Electoral Commissioner*,<sup>58</sup> a majority of the High Court deduced, from sections of the Constitution that mandated that the Parliament (Australian Congress) be directly chosen by the people, something approaching a right to vote.<sup>59</sup> The case arose because of amendments to electoral legislation concerning the right of those currently in prison to vote. In 2004, amendments were made to the effect that those in prison serving sentences of three years or more were denied the right to vote during that period.<sup>60</sup> In 2006, the Act was amended further to deny the right to vote to anyone serving a term of imprisonment, regardless of length, for an offense against Commonwealth or State law.<sup>61</sup> By a majority of 4-2, the High Court declared the 2006

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58. *Roach*, 233 CLR 162.

59. Sections 7 and 24 of the Australian Constitution require that the senators and members of the House of Representatives be directly chosen by the people of the State or the Commonwealth respectively. AUSTRALIAN CONSTITUTION ss 7, 24. Judge Gleeson found that these sections have come to be a constitutional protection of the right to vote. *Roach*, 233 CLR at 174. The joint reasons describe Sections 7 and 24 as constitutional bedrock. *Id.* at 198. Interestingly, Section 41 of the Australian Constitution does expressly confer a right to vote, but this had been interpreted very narrowly by previous High Courts, to apply only to those on the electoral roll at the time of federation. *R v Pearson; ex parte Sipka* (1983) 152 CLR 254 (Austl.). It has been suggested that the existence of Sections 7 and 24 would preclude arbitrary exclusions from the franchise based on gender or race. *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 115 (Austl.).

60. *Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004* (Cth) (Austl.).

61. *Id.*

amendments were invalid, after a challenge by Roach, an Aboriginal Australian.

Chief Justice Gleeson noted that the franchise was critical to representative government and lay at the center of participation in the life of the community and citizenship.<sup>62</sup> Disenfranchisement of any group of adult citizens would have to be well justified, for instance by a rational connection with a position on who is considered to be part of a community, capacity to exercise free choice,<sup>63</sup> or conduct amounting to a rejection of civil responsibility.<sup>64</sup> He rejected the idea that denial of voting entitlement should be seen as punishment, on the basis that a court would have already punished the offender.<sup>65</sup> He acknowledged that serious offending may warrant “temporary” suspension of voting rights,<sup>66</sup> but the 2006 amendments here, denying voting rights to all of those in prison at the relevant time, went too far.<sup>67</sup> The law became arbitrary in not taking into account the length of the prisoner’s term of imprisonment, and by banning short-term prisoners, many only in jail because for a range of reasons non-custodial sentences were not appropriate.<sup>68</sup> The plurality judgment noted that notions of citizenship and membership of the Australian federal body politic were not extinguished by the mere fact of imprisonment. Prisoners remained citizens and members of the Australian community. Their interest and duty to their community and how it was governed survived incarceration.<sup>69</sup>

### B. Europe/United Kingdom

The relevant decision is *Hirst v. United Kingdom (No2)*.<sup>70</sup> Hirst had been sentenced to a term of discretionary life imprisonment, with a designated part of the sentence relating to retribution and deterrence, and a subsequent discretionary aspect based on risk and dangerousness. At the time the prisoner filed his application, he had already served the retribution and deterrence aspect of his sentence. He sought to challenge laws that prohibited a convicted person in

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62. *Roach*, 233 CLR at 174; *see also id.* at 198 (emphasizing that voting in elections for the Parliament lies at the very heart of the system of government for which the Constitution provides); *Rowe*, 243 CLR at 112.

63. *Roach*, 233 CLR at 174.

64. *Id.* at 175. Preservation of the integrity of the electoral process has also been recognised as a legitimate rationale for limits on the franchise. *Rowe*, 243 CLR at 61 (Gummow & Bell, JJ.), 120 (Crennan, J.).

65. *Roach*, 233 CLR at 175.

66. *Id.* at 177.

67. The position of Chief Justice Gleeson can also be argued to be arbitrary, in accepting that disenfranchisement may be constitutionally valid if limited to prisoner serving lengthy sentences, but not when applied to all of those in prison at the relevant time. Chief Justice Gleeson did not explain what the cut-off point was dividing constitutionality from unconstitutionality.

68. *Id.* at 182; *see also id.* at 201 (Gummow, Kirby & Crennan, JJ.). For instance, Chief Justice Gleeson found the person’s homelessness, poverty, mental illness or geographical situation may practically preclude a non-custodial option. *Id.* at ???.

69. *Id.* 199 (Gummow, Kirby & Crennan, JJ.).

70. *Hirst*, 681 Eur. Ct. H.R.

jail pursuant to a sentence from voting whilst detained, subject to exceptions not relevant here.<sup>71</sup> At the time this legislation was passed, a government representative stated that loss of a right to vote was part of the punishment that a prisoner received. Hirst argued the provisions were incompatible with Article 3 of Protocol 1 to the European Convention on Human Rights, requiring contracting parties to hold free elections regularly to ensure free expression<sup>72</sup> of the opinion of the people.<sup>73</sup>

The Grand Chamber agreed with *Hirst* that the United Kingdom legislation was incompatible with Article 3 of Protocol 1.<sup>74</sup> They recognized the essentiality of universal suffrage to the “democratic validity” of the elected legislature, and any departures from this principle could not thwart the free expression of the people.<sup>75</sup> Prisoners enjoyed other convention rights despite their incarceration.<sup>76</sup>

The Chamber noted the government’s justifications for the legislation based on punishment, and the aim of “enhancing civic responsibility and respect for the rule of law.” The Chamber found that Section 3 might be regarded as pursuing such aims.<sup>77</sup> On the other hand, the Chamber found no evidence that judges sentencing individuals mentioned disenfranchisement as one of the consequences of committing a crime, or took into account as part of the sentencing process.<sup>78</sup> These practical realities undercut the government’s arguments that the provisions were justified as inflicting punishment, given that punishment is traditionally a function reserved exclusively for the court, and there was no record of the courts referring to the prisoner’s disenfranchisement in the context of discussing punishment.

Disenfranchisement might sometimes be acceptable, for instance someone who was undermining a country’s democratic foundations, for example by the

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71. Representation of the People Act, 1983, § 3 (U.K.). These related to those imprisoned for contempt of court, and those in prison for fine default.

72. Free expression is used in the Protocol specifically in relation to the exercise of voting rights. It is not the same as First Amendment free expression that obviously applies in a much broader range of contexts.

73. See also International Covenant on Civil and Political Rights art. 25 (recognising the right to vote without distinctions based on race). The Human Rights Committee has concluded that prisoner disenfranchisement laws in the United States breached the requirements of the International Covenant. Concluding Observations of the Human Rights Committee: United States of America, UN Doc. CCPR/C/U.S.A/CO/3/Rev.1/2006, at [INSERT WEBSITE]. Sloss notes that the United States ratified the ICCPR subject to a reservation with respect to race-based distinctions rationally related to a legitimate government objective. Sloss, *supra* note 47, at 455.

74. *Hirst*, 681 Eur. Ct. H.R.; Michael Plaxton & Heather Lardy Prisoner, *Disenfranchisement: Four Judicial Approaches*, 28 BERKELEY J. INT’L L. 101 (2010); Susan Easton, *Electing the Electorate: The Problem of Prisoner Disenfranchisement*, 69 MODERN L. REV. 443 (2006); William Powers, *Hirst v. United Kingdom (No2): A First Look at Prisoner Disenfranchisement by the European Court of Human Rights*, 21 CONN. J. INT’L L. 243 (2006); Ziegler, *supra* note 43.

75. *Hirst*, 681 Eur. Ct. H.R. at 62.

76. *Id.* at 69.

77. *Id.* at 74.

78. *Id.* at 77.

commission of voting fraud. However, it was not a step to be taken lightly, and there had to be a sufficient link between the sanction and the conduct and circumstances of the individual.<sup>79</sup> Such a link was not evident here—the ban applied to a broad range of offenders, from those in jail for a short period to those sentenced to life imprisonment, there was no demonstrated link between a particular offender or offense and the removal of a right to vote, and there was no evidence of a government attempt to weigh the proportionality of the measure as against its impact on a fundamental right. The court held that the general, automatic and indiscriminate restrictions on such a fundamental right as the right to vote was incompatible with Article 3 of Protocol 1.

In a subsequent decision, the Court has confirmed that the decision as to whether a particular individual should be prohibited from voting should be made by a court, rather than parliament. The need for a close link between the offense committed by the offender, and the sanction of disenfranchisement, was emphasized. So, for instance, it might be legitimate to deny the right to vote to someone convicted of electoral fraud, or sedition, but not crimes unrelated to democracy and voting, even very serious in nature.<sup>80</sup>

### C. Canada

These issues arose for determination in *Sauve v. Canada (Chief Electoral Officer)*.<sup>81</sup> Section 51(e) of the Canada Elections Act denied the right to vote to a person serving a term of imprisonment of at least two years. The applicant claimed the provision was incompatible with Section 3 of the Canadian Charter of Rights and Freedoms, guaranteeing Canadian citizens the right to vote, and Section 15, guaranteeing equality under the law and a right not to be discriminated against due, among other things, to national or racial origin. These rights are of course not absolute, Section 1 contemplating reasonable limits prescribed by law that could be justified in a free and democratic society.

The majority considered and dismissed three government arguments in favor of the regime.<sup>82</sup> The government argued, pursuant to Section 1 of the

79. *Id.* at 71.

80. *Frodl v. Austria*, 508 Eur. Ct. H.R. (2010) (holding that Austrian legislation prohibiting those sentenced to more than one year in prison and involving an offense including intent was incompatible with the Convention).

81. [2002] 3 S.C.R. 519 (Can.).

82. Other arguments sometimes presented in support of disenfranchisement include the social contract, that an offender has breached such contract and thereby forfeited their right to participate in society's governance. *E.g.*, *Green v. Bd. of Elections*, 380 F.2d 335, 351 (2nd Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968); *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978) (felons have breached the social contract and, like insane persons, have raised questions about their ability to vote responsibly). This reasoning is open to the criticism that Locke should not be taken to be in favor of permanent disenfranchisement, writing instead of proportionate responses to wrongdoing to allow for reparation and restraint. *The Disenfranchisement of Ex-Felons*, *supra* note 11, at 1304–07. Ewald notes that Locke was writing at a time when the franchise was routinely denied to women, servants, soldiers, and men without property, so it was unsurprising that Locke would deny criminals the right to vote. Ewald, *supra* note 9, at 1075. It also

Charter, that the measures sent an educative message regarding the importance of respect for the law to inmates and the citizenry at large, that allowing prisoners to vote demeaned the political system,<sup>83</sup> and that disenfranchisement was a legitimate form of punishment.<sup>84</sup> The majority accepted the concept of the sovereignty of the people and the fact that representative government involved a delegation of power from the people to the legislature. A universal franchise was an essential part of democracy. Denying a citizen the right to vote denied the basis of democratic legitimacy.<sup>85</sup> Disenfranchisement was more likely to undermine respect for the law and democracy than to enhance it.<sup>86</sup> The idea that certain classes of people were not morally fit or worthy to vote was anachronistic.<sup>87</sup> There was no evidence that disenfranchisement deterred crime or rehabilitated criminals,<sup>88</sup> and it would have a disproportionate impact on the Aboriginal population.<sup>89</sup>

#### *D. Summary of Position in Comparable Nations*

The above three cases recognize the fundamental nature of the franchise in a democratic system, and reflect how the courts have viewed with great skepticism arguments by governments about the supposed need to create exceptions to universal suffrage in the case of prisoners. In each of them, attempts to deny

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reflected a time when voting was seen as a privilege as opposed to a right. As Ewald says, the idea that single criminal transgression constitutes a repudiation of the entire social contract conjures up raw Hobbesian ideas of the compact, in which one is either fully inside the body or completely outside it. This view might have made sense in the walled cities of the Renaissance, but today it is an anachronism. *Id.* at 1103.

83. “There are also traces of this in the United States jurisprudence; for example, the manifest purpose [of disenfranchisement] is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption . . . the presumption is, that one rendered infamous by conviction of felony, or other base offence indicative of great moral turpitude, is unfit to exercise the privilege of suffrage.” *Washington v. State*, 51 Am. Rep. 479, 481 (1884); see also Alec Ewald, *An Agenda for Demolition: The Fallacy and the Danger of the “Subversive Voting” Argument for Prisoner Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109 (2005).

84. It has been noted that whilst in historical times, deprivation of civil liberties, most notoriously civil death was imposed as a form of punishment, but few states today (at least explicitly) rely on such rationale for disenfranchisement provisions. *The Equal Protection Clause as a Limitation on the States Power*, *supra* note 11, at 310. Ewald claims that disenfranchising criminals fails to serve any of the traditional purposes of the criminal law, such as retribution, incapacitation, deterrence or rehabilitation. Ewald, *supra* note 9, at 1105-06. It was unlikely that a person planning to commit a crime would weigh up the loss of voting entitlements in deciding whether or not to commit the crime, and disenfranchisement would often lack the kind of proportionality that is typically a feature of administering punishment for wrongdoing. *Id.*

85. *Suave*, [2002] 3 S.C.R. 519, at 32-33 [THESE PAGE NUMBERS DON’T SEEM TO BE RIGHT TO ME, CHECK NOTES 80-84. MILA] (McLachlin, CJ., Iacobucci, Binnie, Arbour & LeBel, JJ.).

86. *Id.* at 41.

87. *Id.* at 43.

88. *Id.* at 49; Alice Harvey called it a gratuitous impediment to re-entry into the community. Harvey, *supra* note 11, at 1174.

89. *Suave*, [2002] 3 S.C.R. 519, at 60.

the franchise to currently serving prisoners founded on the basis of incompatibility with the fundamental human right to vote.

The following summary may be made of the international material:

- (1) Explicit recognition in a range of jurisdictions of the fundamentally important nature of the broad franchise as an essential element in a system of representative government, where sovereignty lies with the people.
- (2) Reluctance to see disenfranchisement as punishment and reinforcement that punishment needs to be carried out by courts, not legislatures, in any event.
- (3) Confirmation in each case that the right to vote, though fundamental, was not an absolute right.
- (4) Any restriction on such a right would need to be well justified by the legislature, carefully limited and tailored to a specific legitimate interest.
- (5) Arbitrary disenfranchisement, not taking into account the length of sentence given to a prisoner, or the nature of the crime they committed, is not acceptable. In terms of the nature of the crime committed, most relevant is whether the person has committed a crime with respect to elections themselves or a crime otherwise related to the system of democratic government itself; the mere fact that the person has committed a serious offense does not mean that disenfranchisement is justified
- (6) Some linking of the right to vote with rights to expression, and conception of a vote as an expression of something.

As may be implicit, I am broadly in favor of the above principles. They reflect the fundamental nature of the franchise, as preservative of all other rights, to a democratic system of government. All of the jurisdictions studied would consider themselves to be democracies. The fundamental nature of the franchise must be the starting point in the consideration of any regime that purports to detract from this right. This reflects the idea of the people as the sovereign body, ceding certain powers to the legislature to act on their behalf, but always with the power to remove a legislature that is not accurately reflecting their will. This system is imperiled when moves are made to disenfranchise members of the sovereign body.

That having been said, the right to vote is not absolute. Some limitations on this right may be accepted. However, these would need to be very narrowly tailored to a legitimate public interest, and not go beyond what is necessary to achieve this legitimate objective. This type of balancing regime is typical of human rights discourse around the world. For instance, it may be justified to deny the franchise to those guilty of an electoral fraud type offense—that is, to people intent on attacking the very system of democratic government of which the voting right is a part. While a restriction there may be justified, the same



cannot be said for sweeping disenfranchisement provisions that take no or little account of the nature of the crime committed, or any threat that it poses to democratic government. Laws of this nature have generally been identified as arbitrary and disproportionate, and in the balance between human rights and legitimate government regulation of rights, have often been found wanting. Generally, courts in the jurisdictions being studied disfavor arbitrary exercise of power, and laws that operate in a disproportionate manner. Essentially, these characteristics are rightly seen as indicators of unjust laws.

Past arguments supporting prisoner disenfranchisement have often been motivated by underlying racism, in the knowledge that such laws impact adversely on African Americans. The court saw through such schemes. Arguments that voting is reserved for the morally pure belong to a different era when government believed it could enforce morality on citizens, or where we believed there was some kind of common morality. To the extent that morality has religious overtones, they have no place in a secular society. The argument that disenfranchisement is legitimate punishment has not been accepted internationally, and I agree with this conclusion. This argument is weak because it infringes separation of powers principles to which all jurisdictions being studied adhere, which would characterize the infliction of punishment as a power that was judicial in nature. Such a power should not, consistent with the separation of powers principle, be exercised by the legislature.

### III. APPLICABILITY TO THE UNITED STATES

In this part, I consider several ways in which the jurisprudence in the United States in this area might be informed by the preceding discussion of relevant comparative material. Specifically, I make three points: the first concerning the links between a universal franchise and representative government, the second concerning the status of disenfranchisement as punishment, together with the respective roles of legislatures and courts with respect to punishment, and the third conceiving voting as an expressive activity worthy of First Amendment protection.

#### *A. Fundamental Importance of Universal Franchise to the System of Representative Government for Which the Constitution Provides*

As indicated, in the Australian *Roach* decision, the High Court deduced “the right to vote” from two sections of the Australian Constitution, Sections 7 and 24, which confirmed that parliament (congress) should be “directly chosen” by the people.<sup>90</sup> These rights were then used to constitutionally invalidate

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90. For example, The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators. The number of members chosen in the several States shall be in proportion to the respective numbers of their people, AUSTRALIAN CONSTITUTION s 24, the Senate shall be composed of senators for each State, directly chosen by the people of the State. *Id.* at s 7.

legislation disenfranchising those in detention for any offense. Australia does not have a bill of rights, or anything equivalent to the Fourteenth Amendment, or relevant provisions of the Voting Rights Act. There is no direct equivalent to the Fourteenth or Fifteenth Amendment in the Australian Constitution. However, the Australian Constitution did borrow extensively from the United States Constitution.<sup>91</sup>

Article 1, Section 2 of the United States Constitution states that “the House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State legislature.”<sup>92</sup> This section can be read as indicative of the fact that a universal franchise is fundamental to the representative system of government for which the Constitution provides. So concerned is the document with voting rights that numerous amendments to the document prohibit denial of voting rights, for example due to race, “previous servitude,” gender, age or failure to pay tax<sup>93</sup> are constitutionally forbidden. It is true that states are free to determine what qualifications are required for electors,<sup>94</sup> but this is subject to the Constitution.

It can be argued that Article 1, Section 2 and the Seventeenth Amendment confer a general franchise right, reflecting the overwhelmingly democratic theme of the United States Constitution and system of government, such that denial by a state of the voting rights of prisoners or ex-prisoners is contrary to that system of government, and unconstitutional. Article 1, Section 2 is in terms very similar to the provision upon which the High Court of Australia’s determination that the Constitution presumed a representative system of government, in particular Section 24 of the Constitution. The only real difference is that Section 24 requires that the legislature be chosen *directly* by the people, while Article 1 Section 2 says that the House of Representatives in the United

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91. One of the greatest Australian jurists, Sir Owen Dixon, noted that the Australian founding fathers followed with remarkable fidelity the model of the American instrument of government and referred to differences between the Australian and American models as intangible. OWEN DIXON, *JESTING PILATE* 102, 104. In a tribute to John Marshall, former United States Supreme Court Chief Justice, he spoke of the American model as an inspiration to the drafters of the Australian Constitution. *Id.* at 109. In a tribute to former United States Supreme Court Justice Felix Frankfurter, he noted to Australia, no small part of the constitutional law of the United States must be of first importance. *Id.* at 180.

92. U.S. CONST. art. I, § 2, cl. 1 (capitalization as in the original text). The Seventeenth Amendment provides similarly with respect to the Senate.

93. U.S. CONST. amends. XV, XIX, XXIV, XXVI. There is no equivalent in the Australian Constitution.

94. This provision has been interpreted broadly, to delegate broad power to the states in determining their own election laws; as a result, many states have limited the fundamental right to vote for segments of their population, including by the use of districting plans, which may be valid. *Shelby Cnty. v. Holder*, 133 S. Ct. 1236 (2013). Other recent examples include the passage of voter identification laws, and early voting restrictions. I do not wish to understate the vast power that currently exists with state governors and legislatures in this field, but suggest that a more robust interpretation of the requirements of the Constitution might serve to curtail such power.

States shall be chosen by the American people.<sup>95</sup> This would be a rare but not unprecedented example of the use of Australian developments to inform the development of United States electoral law and practice.<sup>96</sup> More generally, there is a growing literature on the influence on United States law of comparative and/or international law.<sup>97</sup>

The United States Supreme Court has found that Article 2 section 1, and its requirement that Congress be chosen by the people, implies something approaching one vote, one value. The Court noted there that the Section required that “each voter should have a voice equal to that of every other in electing members of Congress.”<sup>98</sup> Obviously, this is contradicted when some would-be voters are denied the franchise.

It must be conceded that most of the challenges to electoral laws on the basis of disenfranchisement have instead occurred under the Fourteenth Amendment,<sup>99</sup> a provision without direct counterpart in Australia. However, one advantage of dealing with the issue under Article 1, Section 2 of the United States Constitution, rather than the Fourteenth Amendment, is that the existing position that the Equal Protection provision only apply upon proof of discriminatory intent, would be obviated. Article 1, Section 2 could be read to confer a right to vote, such that attempts at disenfranchisement could be directly attacked upon this basis, without the need to show any particular legislative intent.<sup>100</sup>

*B. Reluctance To See Disenfranchisement as Punishment and Insistence that Punishment Be Carried Out by Courts, Not Parliament*

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95. U.S. CONST. art. I, § 2; AUSTRALIAN CONSTITUTION s 24.

96. One example in this space was the adoption of an Australian ballot system with candidates' names listed, rather than the previous write-in system. *Burdick v. Takushi*, 504 U.S. 428, 446 (1992).

97. *Roper v. Simmons*, 543 U.S. 551 (2005); Ken Kersch, *Outsourcing Authority? Citation to Foreign Court Precedent in Domestic Jurisprudence: The Supreme Court and International Relations Theory* 69 ALB. L. REV. 771 (2009); Rene Provost, *Judging in Splendid Isolation*, 56 AM. J. COMP. L. 125 (2008); TOM BINGHAM, *WIDENING HORIZONS: THE INFLUENCE OF COMPARATIVE LAW AND INTERNATIONAL LAW ON DOMESTIC LAW* (2010); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001). Recently, in the specific context of the criminal law, the climate of international opinion concerning the acceptability of a particular punishment is not irrelevant. *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010) (citing *Enmund v. Florida*, 458 U.S. 782, 796 (1982)). Generally, there is an increasing realization that questions of interpretation of the law of any country, including the United States, can only benefit by a consideration of how equivalent issues have been dealt with elsewhere.

98. *Wesberry v. Sanders*, 376 U.S. 1, 10 (1964).

99. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

100. Katherine Shaw, *Invoking the Penalty: How Florida's Felon Disenfranchisement Law Violates the Constitutional Requirement of Population Equality in Congressional Representation and What to do About It*, 100(3) NW. U. L. REV. 1439 (2006); Rosanna Taormina, *Defying One Person One Vote: Prisoners and the Usual Residence Principle*, 152 U. PENN. L. REV. 431 (2003).

The Australian Constitution provides for a precise delineation between the three arms of government, reflected in three chapters of the document dealing with the legislature, executive, and judiciary.<sup>101</sup> The influence of the American Constitution is again clearly evident in the adoption of such a structure.

The Australian High Court has been very concerned, particularly in recent years, to preserve the separation of powers for which the Constitution provides. This has meant, for instance, that a court cannot be conferred with powers that would lead outside observers to believe that the courts' independence from other arms of government had been compromised.<sup>102</sup> Similarly, the court has not accepted legislation purporting to direct the court in the exercise of its discretion.<sup>103</sup> A court cannot be required to act in a non-judicial way.<sup>104</sup>

There are numerous references from judges to the exclusive nature of their power to punish. Justice McHugh in *Nicholas v The Queen* referred to the courts having an “exclusive function of the adjudgment and punishment of criminal guilt,”<sup>105</sup> and he has noted that a “proceeding which requires . . . the imposition of punishment following determination [of guilt] is a traditional exercise of judicial power.”<sup>106</sup> Chief Justice Griffith spoke of impositions of penalties and punishments as being matters “appertaining exclusively to [judicial] power.”<sup>107</sup> In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, Justices Brennan, Deane, and Dawson refer to the “exclusively judicial function of adjudging and punishing criminal guilt.”<sup>108</sup>

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101. See AUSTRALIAN CONSTITUTION cc. I–III.

102. *Kable v Dir. of Pub. Prosecutions (NSW)* (1996) 189 CLR 15 (Austl.).

103. *S. Austl. v Totani* (2010) 242 CLR 1 (Austl.).

104. *Wainohu v N.S.W.* (2011) 243 CLR 181 (Austl.).

105. (1998) 193 CLR 173, 220 (Austl.) (emphasis added); see also *id.* at 186 (Brennan, CJ.) (“one of the exclusively judicial functions of government is the adjudgment and punishment of criminal guilt”), *id.* at 231 (Gummow, J.) (“the imposition of penalties and punishments are matters appertaining exclusively to the judicial power”) (quoting *Waterside Workers Federation of Australia v. J.F.3D Alexander Ltd* (1918) 25 CLR 434, [PIN CITE] (Griffith, CJ.)), *id.* at 278 (Hayne, J.) (“nothing in [the Act] purports to take any question of adjudging or punishing criminal guilt under a law of the Commonwealth away from the courts”). Mr Hemming seems to think it makes a difference that these comments made by McHugh J were in the context of a federal law. *Id.* at 228. Surely the point of the *Kable* decision is that these principles are of universal application; we do not have different rules applicable at federal and state level in terms of fundamental questions such as separation of powers. Obviously, separation of powers includes questions like what courts do, and what parliaments do. Brennan CJ recognised this expressly in *Nicholas*: the function of adjudication and punishment of criminal guilt under a law of the Commonwealth can be exercised only by those courts in which the necessary jurisdiction is vested pursuant to Chapter III of the Constitution. Those courts include, relevantly for present purposes, the County Court of Victoria. *Id.* at 186–87.

106. *Re Woolley* (2004) 225 CLR 1, 23 (Austl.).

107. *Waterside Workers* 25 CLR at 444 (emphasis added).

108. (1992) 176 CLR 1, 27 (emphasis added); referring to judicial power, they said its most important aspect was the adjudgement and punishment of criminal guilt: that function appertains exclusively to, and could not be excluded from, the judicial power of the Commonwealth; see also *Nicholas v The Queen* (1998) 193 CLR 173, 186 (Austl.) (Brennan, CJ.), *Re Tracey ex parte Ryan* (1988) 166 CLR 518, 580 (Austl.) (Brennan, J.); Chief Justice Mason in *Polyukovich v Cth* (1991) 172 CLR 501, 537 (Austl.) stated it in negative terms that “a statute which contains no

References to this principle also appear in the European Courts. In the Privy Council in the United Kingdom in *Reyes v. The Queen*, Lord Bingham, for the Court, concluded that “a non-judicial body cannot decide what is the appropriate measure of punishment to be visited on a defendant for a crime he has committed.”<sup>109</sup> In the recent *Frodl* decision, the European Court of Human Rights confirmed that the decision regarding disenfranchisement had to be made by a court, not a legislature.<sup>110</sup>

These Australian and European decisions reflect a strong re-assertion of the separation of powers principle, and that a consequence that is classified as punishment belongs in the judicial column.

Of course the United States Constitution was also greatly influenced by Montesquieu’s separation of powers theory.<sup>111</sup> This was an idea conceived from notions of liberty that one way to avoid excessive and arbitrary government power was to divide it among three arms of government—the legislative, executive, and judicial. Each arm would act as a check and balance on the others. The government of the United States, more than most countries, reflects this idea, with the executive power reposed in the President, the legislative power in Congress, and the judicial power in the Supreme Court and lower courts. There is concern when these powers are mixed within one body and when one arm of government appears to be exercising powers traditionally exercised by another arm of government.<sup>112</sup>

In some jurisdictions, separation of powers principles have been used to deny the power of the legislature to impose what is considered “punishment,” on the basis that punishment of an offender is an exclusively judicial function, such that to give such power to the legislature is a breach of the separation of powers principle for which the Constitution provides. There is less discussion of sentencing being an exclusively judicial function in the case law,<sup>113</sup> although the Supreme Court has noted that Congress has acknowledged that sentencing

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declaration of guilt and does not impose punishment for guilt is not a usurpation of judicial power”; *R (Anderson) v. Sec’y of State for the Home Dep’t*, [2003] 1 Cr. App. R. 32, 39 (U.K.); *Al-Kateb v Godwin* (2004) 219 CLR 562, 609–10, 650. Justice Kirby in *Baker v The Queen* (2004) 223 CLR 513, 547 dissented that an attempt to involve the judiciary in the performance of punitive decisions effectively already determined by parliament itself was offensive to the *Kable* doctrine.

109. [2002] UKPC 11, 47.

110. *Frodl*, [2010] Eur. Ct. H.R. 508.

111. “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control,” THE FEDERALIST NO. 47 (James Madison).

112. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

113. Indeed, federal sentencing . . . never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three branches of government. *Mistretta v. United States*, 488 U.S. 361, 364 (1989). It is not the responsibility—or even the right—of this court to determine the appropriate punishment for particular crimes. It is the legislatures. *McCleskey*, 481 U.S. at 319.

“has been and should remain primarily a judicial function.”<sup>114</sup> To date, this principle has not been used to attack the validity of provisions disenfranchising felons. However, I believe there is a good argument that blanket disenfranchisement is a punishment that the legislature is imposing, contrary to the requirements of the separation of powers principle.

Relatedly, justices have clarified that fundamental to a just sentencing process is individualized sentencing.<sup>115</sup> I argue that the individualized sentencing principle is incompatible with existing blanket disenfranchisement laws currently in operation in many parts of the United States. In *Miller v. Alabama*, the Supreme Court reaffirmed these principles when a majority of the Court held that punishment needed to be graduated and proportional to the offender and the offense, such that sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty were not acceptable.<sup>116</sup> This reflected similar sentiment expressed in *Graham v. Florida*.<sup>117</sup> It is hard to see how blanket disenfranchisement, which takes no account of the nature of the felony committed and whether it bears any relationship or threat to the democratic system, reflects the requirement that sentencing be “graduated and proportional.” A more nuanced system is required. The risk of arbitrary or disproportionate sentencing is increased when those deciding upon punishment take into account illegitimate factors like the offender’s race.<sup>118</sup>

Scholars have lamented that the Supreme Court has not been as firm in reasserting separation of powers principles when the legislature has sought to narrow judicial discretion in the criminal law area as they might have been.<sup>119</sup>

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114. *Mistretta*, 488 U.S. at 390. Both substantive judgment in the field of sentencing and the methodology of rulemaking have been and remain appropriate to the judicial branch of the Federal Government. *Id.* 362.

115. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 303; *United States v. Booker*, 543 U.S. 220 (2005). In *Booker* the Court held that sentencing guidelines issued by the Sentencing Commission could only be treated as guidelines, rather than be mandatory. *Id.* at 264. In so doing, it insisted that courts must be able to punish based on the real conduct of the offender and reaffirmed Congress policy of creating consistency in sentencing similar types of offender. *Id.* at 253–54.

116. *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012); *Pepper v. United States*, 131 S. Ct. 1229 (2011); SUSAN EASTON & CHRISTINE PIPER, *SENTENCING AND PUNISHMENT: THE QUEST FOR JUSTICE* (2012); CASSIA SPOHN, *HOW DO JUDGES DECIDE?* 225–41 (2009).

117. See *Graham*, 130 S. Ct. at 2011 (“the concept of proportionality is central to the Eighth Amendment . . . , [it is a] precept of justice that punishment for a crime should be graduated and proportioned to the offence”); *Weems v. United States*, 217 U.S. 249 (1910).

118. *McCleskey*, 481 U.S. at 332 (Brennan, J., dissenting). For instance, some might take into account the race of the offender in arguing that the prevalence of a particular offense is higher among that race, so the need for deterrence is stronger in that instance.

119. Rachel Barkow, *Separation of Powers and the Criminal Law* 58 STAN. L. REV. 989, 1042 (2006); Rachel Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PENN. L. REV. 33 (2003). In one case, considering mandatory sentencing guidelines, the court read them down as being advisory only, rather than binding, but the Court did not base this on the principle of separation of powers, but rather the role of the jury in assessing the existence of factors aggravating the defendants behaviour in relation to sentence. *Booker*, 543 U.S. at 220.

In cases relating to rights other than voting, the court has seemed more concerned with asserting prisoners' constitutional rights.<sup>120</sup> This raises questions regarding consistency of principle, and makes the acceptance of prisoner disenfranchisement, implicating arguably the most important right in a democracy, seem even more anomalous.

There is debate regarding whether disenfranchisement is punishment.<sup>121</sup> Those who have denied that disenfranchisement is punishment have argued instead that disenfranchisement keeps the ballot box "morally pure,"<sup>122</sup> or that only the intelligent or educated should be allowed to vote.<sup>123</sup> An evolving society, and a secular view of public life, has tended to sideline arguments about "moral purity." How could this be judged, and by whom? Morality is not a proxy for criminality. We have long abandoned elitist notions that voting rights are only for the intelligent or educated, contrary as they are to the true concept of democracy. Arguably, this leaves us with punishment.<sup>124</sup> Karlan for instance states that "the view that disenfranchisement is not punitive rests on a long since repudiated conception of the right to vote. The current conception so un-

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120. *Brown v. Plata*, 131 S. Ct. 1910 (2011).

121. Ziegler, *supra* note 43, at 207; Ewald, *supra* note 9, at 1058 ("the reality . . . is that United States criminal disenfranchisement policies are punitive, both in their design and in their results"). There is evidence today of the continued intent to apply disenfranchisement laws to individuals convicted of felonies as a form of punishment. Susan Marquardt, *Deprivation of a Felon's Right to Vote: Constitutional Concerns, Policy Issues and Suggested Reform for Felony Disenfranchisement Law*, 82 U. DET. MERCY L. REV. 279, 297 (2005). Certainly, there is historical support for the suggestion that civil death was imposed as punishment. *The Equal Protection Clause as a Limitation on the States Power*, *supra* note 11, at 310. Infamy was employed as a retributive measure to punish the criminal for his crime against society; the most straightforward explanation of [criminal disenfranchisement] provisions . . . is that they are penal in nature and that the deprivation of the franchise is yet another form of punishment that is imposed upon persons convicted of felonies. BURT NEUBORNE & ARTHUR EISENBERG, *THE RIGHTS OF CANDIDATES AND VOTERS* 32–33 (1976); Howard Itzkowitz & Lauren Oldak, *Restoring the Ex-Offenders Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 730 (1972) (concluding that because the sanction occurs as a direct consequence of criminal convictions, and is not a mere qualification such as age or residency which may be met with the passage of time . . . disenfranchisement must be considered punitive); Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 177 (2001); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 162–63 (2000); *State ex rel Barrett v. Sartorius*, 175 S.F.3D 2d 787, 788 (Mo. 1943); *McLaughlin v. City of Canton*, 947 F. Supp. 954, 971 (S.D. Miss. 1995); *Johnson*, 405 F.3d at 1214, 1228 (describing disenfranchisement as a punitive device stemming from criminal law). Some claim that disenfranchisement is not punishment per se, but an indirect consequence of criminal conviction. *People v. Boespflug*, 107 P.3d 1118, 1121 (Colo. App. 2004). In *Trop v. Dulles* the court claimed that disenfranchisement was not a punishment but rather designated a reasonable ground for eligibility for voting. 356 U.S. 86, 78 (1958).

122. *Hunter*, 471 U.S. at 222.

123. *Lassiter*, 360 U.S. at 45.

124. H.L.A. Hart thought punishment involved (a) unpleasant consequences (b) for an offense against legal rules (c) of an actual offender (d) intentionally administered by humans other than the offender, and (e) imposed and administered by an authority constituted by a legal system against which the offense is committed. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 1 (1968). Disenfranchisement meets each of these conditions.

dercuts originally regulatory justifications for disenfranchising offenders that only penal justifications remain.”<sup>125</sup>

Chin notes that a condition of southern states' re-entry into the Union was that they would not deny voting rights to individuals “except as punishment for crimes.”<sup>126</sup>

Of some relevance here to the question of whether disenfranchisement is “punishment” in the criminal law realm, or something else, is the Supreme Court in *Kennedy v. Mendoza-Martinez*<sup>127</sup> established several factors to determine whether proceedings were criminal or civil in nature. There are: (a) whether the sanction involves an affirmative disability or restraint; (b) whether it has historically been regarded as punishment; (c) whether it comes into play only on a finding of scienter; (d) whether its operations will promote the traditional aims of punishment—retribution and deterrence; (e) whether the behaviour to which it applies is already a crime; (f) whether there is a rational connection to a non-punitive purpose; and (g) whether it appears excessive in relation to the alternative purpose assigned.<sup>128</sup>

Regarding (a), denial of a right to vote clearly represents an affirmative disability or restraint. The person affected is disabled and restrained from voting. Regarding criterion (b), I have indicated that disenfranchisement has historical links with ideas of a civil death and punishment for egregious crimes. Regarding (c), this weighs against disenfranchisement being seen as a criminal consequence, since some of the crimes to which disenfranchisement might apply may not involve scienter.

In relation to criterion (d), disenfranchisement has a retributive aspect. Above I referenced English and Canadian material in which governments admitted that at least one of their purposes in disenfranchising individuals was to punish them. According to criterion (e), the behaviour dealt with is a crime, suggesting that the proceeding that results in a person's disenfranchisement is criminal in nature. Regarding (f), it is hard to find a rational connection between disenfranchisement and objectives other than punishment, given that arguments about the “purity of the ballot box” have fallen out of favour and the consequence is not confined to crimes of a particular nature, for instance attempts to rig elections, that might be more rationally explained in terms of non-punitive intent. For instance, in those cases the government could have argued it was genuinely wishing to ensure that future elections were fair and the results a true reflection of the will and wishes of the people, so that the policy of disenfranchisement furthered a legitimate, non-punitive objective. It is much more

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125. Pamela Karlan, *Convictions and Doubts: Retribution, Representation and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1150 (2004).

126. Gabriel Chin, *The Voting Rights Act of 1867: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. (2004); Fletcher, *supra* note 27.

127. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

128. *Id.* at 168–69.



difficult to make this argument when the consequence of disenfranchisement is applied to such a broad range of offenders.

Regarding criterion (g), disenfranchisement removes one of the most important rights that an individual living in a democracy possesses. As such, it can appear excessive when applied to any felon, regardless of the nature of the crime they committed, and even more so when applied to someone who is no longer incarcerated or under probation.<sup>129</sup>

Having considered each of the factors in this context, I conclude that the application of the *Mendoza-Martinez* factors tends to underscore the criminal and punitive nature of proceedings resulting in disenfranchisement.

If it is accepted that disenfranchisement is punishment, the argument is that the courts, rather than the legislature, should administer it due to separation-of-powers arguments. The court, taking into account the individual circumstances of the case, might be authorized (at least in a very small number of cases) to order disenfranchisement as part of an individual prisoner's punishment.<sup>130</sup> This might be appropriate, for example, where the offender has committed a crime with respect to elections, or is guilty of some other conduct intended to undermine democratic processes, following the European case law earlier discussed. Disenfranchisement should not be mandated by the legislature.

The other argument is that blanket disenfranchisement of felons risks leading to the kind of disproportional outcome of which the Supreme Court has rightly disapproved in other criminal cases. There must be proportionality between crime and punishment.<sup>131</sup> Blanket disenfranchisement inhibits this from occurring. Karlan makes the same point:

A categorical disenfranchisement of all ex-offenders convicted of a felony lumps together crimes of vastly different gravity. The irresistible political pressure toward ever more criminalization means that much not particularly blameworthy conduct is classified as a felony. That potential sentences for a felony conviction range from crimes for which the statutory maximum is one year's imprisonment to ones for which the maximum is death shows that all felonies are not equally serious.<sup>132</sup>

This debate has sometimes occurred in the context of so-called mandatory sentencing laws, where a legislature may seek to direct the courts to a particular outcome in relation to punishment of an individual. The United States Supreme

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129. In *Simmons*, 575 F.3d at 56–70, Justice Torruella, dissenting, applied these factors, concluding that disenfranchisement was a punishment.

130. Marquardt, *supra* note 113, at 297. Rather than voting rights being rescinded automatically upon the commission of a felony, a judge would consider whether to include disenfranchisement as a part of criminal sentencing on a case-by-case basis. *Id.*

131. *Miller*, 132 S. Ct. 2455; *Pepper*, 131 S. Ct. 1229; *Graham*, 130 S. Ct. 2011; *Weems*, 217 U.S. 249. Lifetime disenfranchisement—which continues to punish the offender long after she has served her sentence—clearly fails (the test of proportionality). Ewald, *supra* note 9, at 1103.

132. Karlan, *supra* note 117, at 1167.

Court interpreted sentencing principles issued by the Sentencing Commission as guidelines only, rather than mandatory. In so doing, it insisted that courts must be able to punish based on the individual circumstances of the offender, and consistency in sentencing was fundamental.<sup>133</sup> Again, these principles are offended by legislated blanket disenfranchisement of felons.

Finally, there is the question of consistency on the issue of prisoners' rights. Somewhat ironically, there is a suggestion that the courts have been more prepared to uphold the rights of prisoners in other constitutional contexts than in the fundamental context of voting. A recent illustration involved the question of the right of felons to firearms, and the applicability of the Second Amendment in such cases. Recently, a District Court judge struck out a Louisiana law banning felons from owning firearms. The judge accepted an argument that the ban, applying to a fundamental right, was overbroad. It was potentially applicable to an overly broad range of offenders, including those who had not been convicted of crimes involving violence.<sup>134</sup>

### *C. Voting is Expression and an Exercise of First Amendment Rights*

My other argument here is that voting is a form of expression and entitled to first amendment protection. Laws that disenfranchise felons and ex-felons can be argued to contravene the First Amendment. Obviously, rights protected by the Constitution cannot be deprived by the legislature. Were the court to accept this argument, it would obviate the need to overrule the longstanding *Richardson* precedent, given that when it validated prisoner disenfranchisement laws, it did not specifically reject arguments that the First Amendment precluded such laws.

Case law and academic opinion have viewed voting as a form of expression. Most recently in *Nevada Commission on Ethics v. Carrigan*, Justice Alito noted that "voting has an expressive component in and of itself."<sup>135</sup> In *Doe v.*

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133. *Booker*, 543 U.S. at 220.

134. *New Orleans Judge Rules Statute Forbidding Felons from Having Firearms Unconstitutional After Fundamental Rights Amendment*, THE TIMES-PICAYUNE, March 21, 2013. The decision is currently on appeal to the Louisiana Supreme Court. Previously, the United States Supreme Court has accepted bans on felons owning weapons. *District of Columbia v. Heller*, 554 U.S. 570 (2008) (dicta).

135. *Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2354 (2011) (Alito, J., dissenting) (disagreeing because the majority denied that a law preventing a member of congress from voting was violative of first amendment principles). The finding of the majority is not directly relevant here because they expressly distinguished between a person exercising a right to vote, and a member of congress exercising a right to vote, in terms of the expression involved. The author personally finds this distinction troubling, as Justice Alito did in the case, but this issue need not be further explored here. It is sufficient to note that nothing in the majority judgment denies that when an individual exercises a personal right to vote, they are engaged in expressive activity.

*Reed*, the Supreme Court found that signing a petition calling for reforms was the expression of a political view.<sup>136</sup> The fact that no one knew why the view was held, how strongly it was held, or whether the view had been well-considered or not, was irrelevant.<sup>137</sup> This view enjoys academic support.<sup>138</sup>

The United States Supreme Court has robustly defended First Amendment freedom of speech. Speech on public issues and/or surrounding campaigns for political office occupies the “highest rung” and is entitled to special protection,<sup>139</sup> with restrictions requiring compelling justification.<sup>140</sup> Consistent with the fundamental link between a broad franchise and representative government, the court has noted that a representative democracy ceases to exist when a constituent can be restrained from communicating about political matters.<sup>141</sup> A person cannot be barred from speaking because those in control of government think that what is said or written is foolish, unfair, false or malicious.<sup>142</sup> It was imperative for the continuation of representative government that government remained responsive to the will of the people, and that any desired change be secured through peaceful means. This meant that free speech was “invio-

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136. *Doe v. Reed*, 130 S. Ct. 2811, 2817, 2829, 2830 (2010) (Sotomayor, J., concurring) (referring to the expressive act of petition signing) (Stevens, J., concurring) (acknowledging the casting of a vote served an expressive purpose). Further, in *Burdick*, the Supreme Court referred to expressive activity at the polls. 504 U.S. at 438

137. It is considered relevant to note this to counter arguments that voting is effectively not expression because of the low quality of the message it communicates. Low quality here means that the precise message the voter is intending to convey in casting their vote in a certain way is admittedly often unclear, beyond a broad approval for one candidate, or one political party, over another.

138. GEOFFREY BRENNAN & LOREN LOMASKY, *DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE* (1993). Voting is essentially an expressive exercise. *Id.* By voting, the individual shows something of herself, displaying desires, beliefs, judgments and perceptions. The voter gives voice to her sentiments and views, concretizes them and asserts them, though anonymously, through the marking of the candidates name or the yes or no of a referendum. Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 333 (1993); see also Jason Halperin, *A Winner at the Polls: A Proposal for Mandatory Voter Registration*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 69, 103 (2000) (there is a strong argument to be made that voting is a form of speech); Graeme Orr, *The Choice Not to Choose: Commonwealth Electoral Law and the Withholding of Preferences*, 23 MONASH U. L. REV. 285 (1997). Some consideration of voting as expressive activity occur in the context of the question of compulsory voting, but authors there also see voting as expressive. Jeffrey Bloomberg, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 FORDHAM L. REV. 1015, 1016–17 (arguing that abstention from voting was political expression protected by the First Amendment); Heather Lardy, *Is There a Right Not to Vote?*, 24(2) OXFORD J. LEGAL STUD. 303, 318 (2004); *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591, 603 (2007).

139. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011); *Police Dep’t of the City of Chicago v. Morales*, 408 U.S. 92, 95 (1972) (above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content); *Brown v. Hartlage*, 456 U.S. 45, 53 (1982) (the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office).

140. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 540 (1980).

141. *N.Y. Times v. Sullivan*, 376 U.S. 254, 297 (1964).

142. *Id.* at 299.

late.”<sup>143</sup> The court has been especially concerned with provisions affecting speech that are narrowly targeted to a small number of individuals or organizations.<sup>144</sup> This is for two reasons—the fact that those targeted are relatively few in number limits the ability of the ballot box to remedy the situation.<sup>145</sup> This concern is surely even greater when the restriction on speech at issue is voting, as is discussed here. Secondly, the more narrowly targeted the measures, the more likely that they are seen as an attempt to censor particular views, again seen as particularly egregious in First Amendment jurisprudence.<sup>146</sup>

It is argued that disenfranchisement is readily challengeable on First Amendment grounds. The casting of a vote is expression, and in the pantheon of expressive rights, is of the highest order in the political context. Restrictions require compelling justification. It is hard to see that there is compelling justification for disenfranchisement measures and even if there is, the measures are not narrowly targeted to reflect such justification, as I argue below. (While the discussion below might appear to repeat what was said earlier about the question of punishment, it is placed here because it is in application of the test of “compelling justification,” which would justify interference with First Amendment rights, according to the case law—as such I believe it is appropriately placed).

For instance, it cannot today be seriously argued that the measures are justified by the need to reserve the right to vote to the “morally pure.” There is an insufficient link between criminal activity and moral purity. The question of what is “morally pure” is a subjective and value-laden one. Many things some would consider morally impure are not criminal.

In addition, as the Canadian Supreme Court noted, there is no evidence that disenfranchisement deters crime or serves a rehabilitative purpose, so these cannot be relied upon. Arguments that disenfranchisement is compellingly justified as an aspect of punishment are also highly questionable, given it is traditionally the role of a court to administer punishment, and blanket disenfranchisement raises concerns about the arbitrary and disproportional “punishment.” The Supreme Court has recently reconfirmed that sentencing without any penological justification is by its nature disproportionate to the offense.<sup>147</sup>

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143. *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). Subject to extremely limited exceptions such as speech inciting violence. *Id.*

144. *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 585 (1983); *Leathers v. Medlock*, 499 U.S. 439 (1991).

145. *See also* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (stating that where a measure is likely to curtail the operation of political processes that can ordinarily be relied on to protect minorities, greater scrutiny might be justified).

146. The Supreme Court has been particularly concerned, in First Amendment jurisprudence, with laws banning or regulating speech because of the viewpoint it expresses. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

147. *Graham*, 130 S. Ct. at 2033 (Kennedy, J., concurring).

It is possible that denial of the franchise to those convicted of electoral fraud, for example, is justifiable if the measures are narrowly cast. A serious argument could be made based on legitimate fears that the offender could attempt to pervert the democratic process if allowed to vote. Measures responding narrowly to this genuine concern *might* (I put it no higher than this) pass the test of compelling justification.

However, the disenfranchisement provisions are not so confined, applying to all felons, regardless of the particular individual or the nature of their crime. Certainly, the vast majority of those affected have not committed electoral fraud. Further, in some cases, these restrictions extend post-probation, post-parole and post-incarceration. For this reason also, it is hard to see how there is compelling justification for such a restriction on expression, and this restriction is hardly narrowly tailored to reflect that interest. The court should be concerned with measures that have the effect of prohibiting a small number of people from exercising this expression right at the ballot box, given the inability of those affected to practically remedy the wrong. And targeting of a small population, such as prisoners, can be perceived as an attempt to censor particular voices from whom the legislature would not like to hear, anathema to a true democracy.<sup>148</sup>

#### IV. CONCLUSION

In so many ways, the United States has set an example to the world in terms of rights protection. Its Bill of Rights has been an example to others of the kinds of human rights that warrant protection, and has been adopted and adapted in many jurisdictions subsequently. In this light, the protection given (or not given) to voting rights presents a real anomaly. This Article seeks to understand the present situation in terms of the racism that has plagued the United States (as with many countries), given past attempts to deny the franchise to African Americans, and the clearly disproportionate impact that felon disenfranchisement laws have on racial minorities, African Americans in particular. The United States has come a long way on expanding the franchise and in dealing with its race issues, but there are further legal steps to go. In particular, narrow interpretations of the Fourteenth and Fifteenth Amendment, as well as the Voting Rights Act, have perversely allowed felon disenfranchisement, and its disproportionate impact on racial minorities, to continue.

I suggest in this Article that the United States could look to developments in comparable countries in this area, and in particular the willingness of courts in other countries to strike down prisoner disenfranchisement laws as being

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148. These arguments are quite different from arguments that disenfranchisement is bad public policy, perpetuating an offenders sense of alienation and disengagement from society. See *The Disenfranchisement of Ex-Felons: Citizenship, Criminality and the Purity of the Ballot Box*, 102 HARV. L. REV. 1300 (1989).

contrary to representative democracy, to seriously question claimed justifications for such provisions, to ensure that any restrictions are narrowly tailored to reflect any legitimate governmental interests, and to insist that disenfranchisement is punishment to be administered by a court rather than a legislature, upholding separation of powers principles. I also suggest that voting should be seen as an expressive right worthy of First Amendment protection, and special protection given its links to the democratic system of government for which the Constitution provides. It would be extremely difficult for governments to show compelling justification for the kind of restriction on political expression caused by prisoner disenfranchisement laws, or that such restrictions are narrowly tailored to any such interest that does exist.